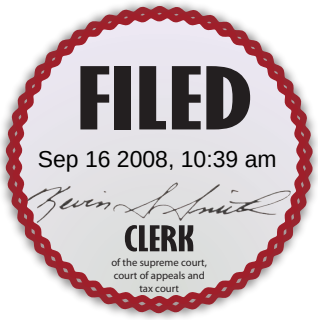

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IN THE
COURT OF APPEALS OF INDIANA

CLARENCE OATTS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0802-CR-133
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patricia J. Gifford, Judge
Cause No. 49G04-0702-FA-31467

September 16, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Clarence Oatts appeals his convictions and sentence for two counts of class A felony child molesting; two counts of class C felony child molesting; and attempted child molesting as a class A felony.[1]

We affirm.

ISSUES

1. Whether the trial court erred in excluding evidence.

2. Whether the trial court erred in sentencing Oatts.

FACTS

K.M.S. is the mother of two daughters: E.D., born June 28, 1993, and K.S., born September 25, 1996. Oatts is K.M.S.'s stepfather and has known K.M.S. for approximately twenty years. Prior to February of 2007, E.D. and K.S. would spend "[b]asically every weekend" with Oatts and K.M.S.'s mother at the Oattses' Indianapolis home. (Tr. 17). Oatts "basically did everything for" K.M.S.'s family, including paying their bills and "helping with . . . everything." *Id.*

When E.D. was "between the ages of five and eight," she and Oatts were sitting on a sofa, watching television, when Oatts told her to remove her underwear. (Tr. 67-68). After E.D. removed her underwear, Oatts "scooted [her] towards the edge of the couch and he pulled down his long Johns and put his thing . . . in between [her] legs." (Tr. 69). He then attempted to insert his penis into her vagina.

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[1] Ind. Code § 35-42-4-3.

Thereafter, E.D. was in the kitchen of the Oattses' home when Oatts "unbuttoned [her] pants and then he put his mouth on [her] vagina." (Tr. 74). When E.D. was eleven or twelve years-old, Oatts put his hands and mouth on her breasts. E.D. did not tell K.M.S. about these incidents because Oatts told her she would get in trouble if she told.

When K.S. was six years-old, she and Oatts were playing "truth and dare . . . ." (Tr. 35). Oatts "dared [her] to put [her] mouth on his penis and told [her] that it was chocolate and so [they] went to the bathroom and [she] did." (Tr. 35). After Oatts ejaculated, he made K.S. brush her teeth and take a bath.

During the next four years, Oatts would tell K.S. to "put [her] hand on his penis" and make her move her hand "up and down" until he ejaculated. (Tr. 37). Oatts did this "[a] lot of times." (Tr. 37).

When K.S. was ten years-old, Oatts approached her as she sat in the living room and told her "he was getting hard and he wanted [her] to hump him so that he could get off . . . ." (Tr. 43). Oatts removed his and K.S.'s clothes and touched her vagina with his penis. He tried to put his penis in her vagina, but "[it] hurt." (Tr. 44). After approximately fifteen minutes, he ejaculated.

On or about February 10, 2007, Oatts came into a bedroom, where K.S. was watching a movie. Oatts told her to lie down on the bed, and he proceeded to remove their clothing. He then told her "to get on top of him and he made [her] hump his penis." (Tr. 40). His penis "was touching [K.S.'s] private part." (Tr. 41). He then tried to insert his penis into her vagina. Afterwards, Oatts told K.S. that she "was a good girl." (Tr. 42).

Initially, K.S. did not inform her mother of these incidents because Oatts "told [her] he'd kill [her] mommy." (Tr. 44). When E.D. asked K.S. whether Oatts was touching her inappropriately, K.S. denied it. On or about February 13, 2007, however, K.S. told her mother what Oatts had been doing. When K.M.S. confronted E.D. about the alleged abuse, she initially denied that Oatts had abused her "[b]ecause [she] didn't want to get in trouble," and she "didn't want him to get in trouble either." (Tr. 78; 79). K.M.S. reported the abuse to the Indiana Department of Child Services.

On February 26, 2007, the State charged Oatts with Counts 1 through 3: class A felony child molesting; Count 4: class A felony attempted child molesting; Counts 5 and 6: class C felony child molesting; and Count 7: class C felony criminal confinement. The trial court commenced a two-day jury trial on December 10, 2007. At the conclusion of the State's case-in-chief, Oatts moved for a directed verdict upon Count 7, which the trial court granted. The jury returned a verdict of not guilty on Count 3 and guilty on the remaining counts.

The trial court held a sentencing hearing on January 11, 2008. The trial court found "that there are aggravating circumstances by reason of the fact that [Oatts] was, in fact, in a position of trust with both of these victims; secondly, that there were two separate victims; and third, that these incidents occurred over a period of time." (Tr. 249). The trial court found Oatts' health, age, and his family's dependence on him to be mitigating circumstances. The trial court then sentenced Oatts to thirty years each on Counts 1, 2, and 4; and four years each on Counts 5 and 6. The trial court ordered that the sentences on Counts 4 and 5 be served concurrently with the sentence on Count 1 and

the sentence on Count 6 be served concurrently with the sentence on Count 2. Finding that the aggravators outweighed the mitigators, the trial court ordered that the sentence on Count 2 be served consecutively to the sentence on Count 1. Thus, Oatts received an executed sentence of sixty years.

Additional facts will be provided as necessary.

DECISION

1. Exclusion of Evidence

Oatts asserts that the trial court erroneously "excluded evidence regarding the motive of the alleged victims to testify falsely." Oatts' Br. at 4. Specifically, Oatts contends that the trial court erred in excluding the following:

> evidence as to why the alleged victims would make false accusations against him, testimony regarding the relationship between the alleged victims and their mother, testimony about one of the girls running away from home, testimony regarding a conversation with one of the girls after she sustained a beating at the hand of her mother, and testimony that one of the girls was beaten by her mother.

Oatts' Br. at 6 (citations to record omitted).

> [W]e note that the decision to admit or exclude evidence is within the trial court's sound discretion and is afforded great deference on appeal. The admission or exclusion of evidence will not generally be reversed on appeal absent a manifest abuse of discretion that results in a denial of a fair trial. An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. Moreover, this court will find an abuse of discretion when the trial court controls the scope of cross-examination to the extent that a restriction substantially affects the defendant's rights. Evidence of bias, prejudice, or ulterior motives on the part of a witness is relevant at trial, as it may discredit the witness or affect the weight of the witness's testimony.

Zawacki v. State, 753 N.E.2d 100, 102 (Ind. Ct. App. 2001) (citations omitted).

As a rule, however, "errors in the admission or exclusion of evidence are to be disregarded as harmless unless they affect the substantial rights of a party." *Redding v. State*, 844 N.E.2d 1067, 1069 (Ind. Ct. App. 2006), *reh'g denied*. "In determining whether an evidentiary ruling affected a party's substantial rights, we assess the probable impact of the evidence on the trier of fact." *Id.*

Prior to trial, the State filed a motion in limine seeking to exclude, *inter alia*, "[a]ny evidence, questioning, or comments concerning prior uncharged or charged criminal acts of any State's witness which is not admissible pursuant to Indiana Evidence Rule 609"; and "[a]ny questions, testimony, evidence, or statements made concerning any specific acts of dishonesty by any witness." (App. 53). Oatts did not object to the motion, which the trial court granted.

During the trial, Oatts testified that he met K.M.S.'s mother when K.M.S. was fifteen years-old. According to Oatts, he and K.M.S. "didn't have [a relationship] because she was never there." (Tr. 162). K.M.S., however, testified that prior to February of 2007, Oatts was "like [her] best friend. He was a father, and they "had a good relationship." (Tr. 16). Upon cross-examination, Oatts' counsel did not further explore K.M.S. relationship with Oatts.

As to E.D. running away from home, K.M.S. testified that E.D. had run away on or about February 13, 2007, because K.M.S. "was too strict . . . ." (Tr. 26). E.D. testified on cross-examination that she ran away from home because she "was mad at [K.M.S.]" and "just gettin [sic] tired" of her "just always just nagging and getting on [E.D.'s] nerves . . . ." (Tr. 82, 83).

Regarding the conversation between Oatts and E.D., Oatts testified that he received a telephone call from E.D. on or about February 14, 2007. He further testified that she told him "that her mother and them was [sic] in there trying to get them to say that [he] . . . was touching [E.D. and K.S.,] and she said that she wasn't supposed to tell [him] . . . ." (Tr. 159). According to Oatts' testimony, E.D. then asked Oatts not to telephone K.M.S. because she was afraid that K.M.S. would "beat [her] up . . . ." (Tr. 159). When asked whether E.D. spoke to him about running away from home, the trial court sustained the State's objection.

Upon cross-examination, E.D. denied "beg[ging] [Oatts] not to tell [her] mother cause [sic] something would happen to [her]." (Tr. 84). Rather, she testified that she "had spoke[n] to him about what [K.S.] had said to [her] and [K.M.S.] about Oatts molesting K.S." (Tr. 84).

During cross-examination of E.D., Oatts attempted to elicit testimony from her regarding "get[ting] in some type of trouble where [she] got a beating and had a lot of scars on [her] legs[.]" (Tr. 87). The trial court, however, sustained the State's objection. Thereafter, E.D. testified that although she initially denied being molested by Oatts, she later admitted the molestation "when [her] mother started begging [her.]" (Tr. 88). She again admitted that she told K.M.S. about the molestation "because [K.M.S.] was begging [her] and crying[.]" (Tr. 88).

Here, Oatts was able to elicit information regarding why E.D. ran away from home and her relationship with K.M.S. Regarding the alleged beating, Oatts himself testified that E.D. only claimed that K.M.S. would "beat [her] up . . . ." (Tr. 159). Furthermore,

he testified that E.D. expressed fear of K.M.S. if K.M.S. discovered she had spoken with Oatts; E.D. did not express fear if she denied the molestation. Upon cross-examination, E.D. denied telling Oatts that K.M.S. would harm her. As to her relationship with Oatts, K.M.S. testified that they had a good one. The trial court did not limit Oatts' cross-examination of K.M.S. on this topic. Moreover, Oatts elicited testimony from E.D. that although she initially denied the molestation, she later admitted to it "because [K.M.S.] was begging [her] and crying[.]" (Tr. 88).

Given the above, we cannot say that Oatts was prejudiced or his substantial rights affected by the trial court's exclusion of testimony. He has failed to establish by an offer of proof that there was a nexus between the girls' accusations and any alleged intimidation by K.M.S. to testify falsely. He presents no evidence that he deposed either the girls or K.M.S. prior to trial or otherwise established a foundation for the admission of his proffered evidence. In addition, he had ample opportunity to cross-examine both K.M.S. and E.D.; further, he was able to present his defense through cross-examination in addition to his own testimony. Additionally, the jury had ample opportunity to judge E.D.'s credibility. Thus any alleged error in excluding testimony was harmless.

2. Sentencing Errors

Oatts asserts the trial court erred in sentencing him.[2] Specifically, Oatts argues that the trial court improperly found aggravating circumstances and that his sentence is inappropriate.

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[2] We note that the State charged that the offenses under Counts 1, 4, and 5 took place "[o]n or between January 1, 2000, and December 31, 2004," while the offenses under Counts 2 and 6 took place "[o]n or

a. *Consecutive sentences*

Citing *Blakely v. Washington*, 542 U.S. 296 (2004), Oatts argues that the trial court improperly identified aggravating circumstances. We disagree.

In *Blakely*, the United States Supreme Court held that the Sixth Amendment requires a jury to determine beyond a reasonable doubt the existence of aggravating circumstances used to increase the sentence for a crime above the presumptive sentence assigned by the legislature. 542 U.S. at 301. Furthermore, "the sort of facts envisioned by *Blakely* as necessitating a jury finding must be found by a jury under Indiana's [presumptive] sentencing laws." *Smylie v. State*, 823 N.E.2d 679, 686 (Ind. 2005), *cert. denied*, 546 U.S. 976 (2005).

Regarding consecutive sentences, however, our Indiana Supreme Court has found "no language in *Blakely* or in Indiana's sentencing statutes that requires or even favors concurrent sentencing." *Id.* It therefore has found no violations under *Blakely* when consecutive sentences are imposed. *Id.*

In this case, the trial court found "that there are aggravating circumstances by reason of the fact that [Oatts] was, in fact, in a position of trust with both of these victims; secondly, that there were two separate victims; and third, that these incidents occurred

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between September 25, 2002, and February 10, 2007[.]" (App. 25). Effective April 25, 2005, the legislature amended Indiana Code section 35-50-2-4, which set forth the sentencing range for a class A felony, to provide for an "advisory" rather than "presumptive" sentence. *See* P.L. 71-2005, § 7 (eff. Apr. 25, 2005). We shall analyze the propriety of Oatts' sentence under the presumptive regime.

At the time of Oatts' offenses, the statutory sentencing range for a class A felony was twenty to fifty years, with the presumptive sentence being a fixed term of thirty years. I.C. § 35-50-2-4 (amended 2005). The statutory sentencing range for a class C felony was two to eight years, with the presumptive sentence being a fixed term of four years. I.C. § 35-50-2-6 (amended 2005).

over a period of time." (Tr. 249). Based on the aggravating circumstances, the trial court imposed consecutive sentences. We find no error.

Citing to *State v. Ice*, 170 P.3d 1049 (Or. 2007), *cert. granted*, 128 S. Ct. 1657 (Mar. 17, 2008) (petition for writ of certiorari granted to address whether the Sixth Amendment, as construed in *Blakely* and *Apprendi*, requires that facts—other than prior convictions—necessary to imposing consecutive sentences be found by the jury or admitted by the defendant), Oatts contends that "[d]espite Indiana case law to the contrary, the clear meaning of *Blakely* and *Apprendi* [*v. New Jersey*, 530 U.S. 466 (2000)] requires that all facts, even those used to support consecutive sentencing, be found by a jury or admitted by a defendant." Oatts' Br. at 10. Thus, Oatts urges this court to vacate "that portion of the sentencing order directing consecutive sentences . . . ." Oatts' Br. at 11.

"It is not this court's role to reconsider or declare invalid decisions of our supreme court." *Horn v. Hendrickson*, 824 N.E.2d 690, 694 (Ind. Ct. App. 2005). We are bound by our Supreme Court's decisions, and its precedent is binding until it is changed by the supreme court or legislative enactment. *Id*. Accordingly, we decline Oatts' request to reconsider *Smylie*.[3]

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[3] Even if we were to determine that *Blakely* applied to consecutive sentences, we note that Oatts testified that he "was a father and a grandparent and a mother" to E.D. and K.S. (Tr. 168-69). Although Oatts did not admit that he was in a "position of trust" to E.D. and K.S., he did admit to the fact of his relationship with them. Accordingly, we find no *Blakely* violation in finding Oatts to be in a position of trust. *See Trusley v. State*, 829 N.E.2d 923, 926-27 (Ind. 2005) (finding that the admission at trial that Trusley was the victim's day care provider supported the trial court's "appropriate legal observation" regarding Trusley's position of trust with the victim). Furthermore, the trial court did not improperly find the number of victims and the offenses occurring over a period of time to be aggravators as the jury found Oatts guilty of five counts involving two victims and encompassing acts from between January 1, 2000

b. *Inappropriate sentence*

Oatts next asserts that the "imposition of consecutive sentences resulting in a total executed sentence of sixty years was not appropriate in light of the nature of the offense and the character of the offender." Oatts' Br. at 11. We disagree.

We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). It is the defendant's burden to "'persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review.'" *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007) (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007).

The "nature of the offense" refers to the statutory presumptive (now advisory) sentence for the class of crimes to which the offense belongs. *Id*. Thus, the presumptive (advisory) sentence is meant to be the starting point for the trial court's consideration of the appropriate sentence for the particular crime or crimes committed. *Id*. The "character of the offender" refers to the sentencing considerations in Indiana Code section 35-38-1-7.1, which contains general sentencing considerations, the balancing of aggravating and mitigating circumstances, and other factors within the trial court's discretion. *Id*. "This court is mindful of the principle that 'the maximum sentence enhancement permitted by law should be reserved for the very worst offenses and offenders.'" *Matshazi v. State*,

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and February 10, 2007. *See Drakulich v. State*, 877 N.E.2d 525, 534 (Ind. Ct. App. 2007) (finding that the number of victims and overt acts were not improper considerations where the jury found the defendant guilty of eleven different counts involving six different victims), *trans. denied*.

804 N.E.2d 1232, 1241 (Ind. Ct. App. 2004) (citing *Borton v. State*, 759 N.E.2d 641, 648 (Ind. Ct. App. 2001), *trans. denied*), *trans. denied*.

The record reflects that Oatts repeatedly molested his two step-granddaughters over a significant period of time. These facts justify Oatts' consecutive sentences. Furthermore, the trial court sentenced him to the presumptive sentence of thirty years for each class A felony and the presumptive sentence of four years for each class C felony—sentences significantly less than the maximum Oatts could have received. Accordingly, we find Oatts' sentence to be appropriate.

Affirmed.

FRIEDLANDER, J., and BARNES, J., concur.